

DEPARTMENT OF STATE REVENUE

04970302.LOF

LETTER OF FINDINGS NUMBER: 97-0302

Sales and Use Tax

For The Period: 1993 Through 1995

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ISSUE

**I. Tax Administration – Penalty**

**Authority:** IC 6-8.1-10-2.1; 45 IAC 15-11-2

The taxpayer protests the proposed assessment of a negligence penalty.

STATEMENT OF FACTS

The taxpayer operates a full-service travel center located in Indiana. The travel center is open twenty-four hours a day, year round. The products and services that the taxpayer has available to its customers include diesel fuel and a full service restaurant.

**I. Tax Administration – Penalty**

DISCUSSION

The taxpayer argues that the review process of the audit changed from the prior audits. The taxpayer argues that this change affected two areas in particular: (1) sales tax on utilities used by the restaurant, and (2) sales tax on diesel fuel sales.

According to the taxpayer, in the past it has received a complete (i.e., 100%) exemption for its electric and gas usage that powered equipment used in food preparation. The auditor relied upon usage studies of the two meters, one electric and the other gas, which lowered the taxpayer's exemptions on the meters below the predominate use threshold outlined in Information Bulletin #55. In the hearing, the taxpayer admitted that the equipment is not always used to prepare food, but argued that it is impractical to turn the equipment off and then turn it back on. Although it may indeed be impractical, nonetheless Information Bulletin #55 explicitly deals with partial exemptions for users who do not meet the predominately used test.

The taxpayer also argues that the Department should be estopped from assessing use tax because the Department did not tell the taxpayer to adjust its calculation of tax in the prior audit. However, the Indiana Supreme Court addressed the issue of taxpayer reliance on prior audits in Walgreen v. Gross Income Tax Division, 225 Ind. 418 (1947), holding that "[t]he taxing authorities of the state during the period mentioned, could not by failing to do their duty, or by any act or failure to act, waive the right and the duty of the state to assess and collect the taxes for the years following." Despite the taxpayer's argument that a "dramatically" different methodology was used, all the auditor did was use relevant information—namely the meter usage study. In the context of the penalty, the taxpayer still has not shown that the deficiency was due to reasonable cause and not willful neglect. The taxpayer has not overcome its *prima facie* burden.

With regard to the second issue, the taxpayer argues that this is a confusing area of the law and therefore the penalty should not be assessed. Without getting into the substantive issue of sales of diesel fuel, suffice it to say that the law is not as confusing as the taxpayer purports. For instance, Indiana Code 6-2.5-7-3, the Indiana Administrative Code 45 IAC 2.2-8-12(d), and Information Bulletin #15 each deal with the procedures one must follow to be in compliance with exemption certification on sales of diesel fuel.

The taxpayer has not carried its burden of showing that the deficiency was not due to negligence on the taxpayer's behalf. 45 IAC 15-11-2 defines negligence as "failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." A diligent taxpayer would have consulted the Indiana Code, the Indiana Administrative Code, and the Department's Information Bulletins. The taxpayer has not shown reasonable cause for the deficiency.

FINDING

The taxpayer's protest is denied.